Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

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PRO SE ATTORNEY-PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Smith was "in custody" for purposes of filing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 attacking on Fifth Amendment due process grounds his disbarment from the practice of law before the Supreme Court of the United States.

Whether by issuing his (March 11, 1998) order dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without granting a hearing or addressing the issues raised and argued by him therein, Judge Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law, including his due process right to a fair and impartial decision-maker.

Whether Judge Daniel also deprived Mr. Smith of his First Amendment right to access to the courts to petition the government for a redress of grievances.

Whether by issuing its (June 19, 1998) order affirming Judge Daniel's dismissal of Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without addressing the issues raised and argued by him in his verified response to order to show cause, and motion for issuance of certificate of appealability, the Tenth Circuit committed a blatant and egregious violation of his right to meaningful appellate review under 28 U.S.C. § 2253.

Whether the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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The People of the State of Colorado v. David Lee Smith, Case No. GC 95B-124 (Colo.) (unpublished findings of fact and recommendations of the hearing board filed March 6, 1997).

David L. Smith v. Supreme Court of the United States of America, Case No. 98-1108 (10th Cir.) (unpublished order filed August 14, 1998).

JURISDICTION

The orders sought to be reviewed were entered on March 11, 1998 and June 19, 1998. Rehearing of the Tenth Circuit's (June 19, 1998) order was summarily denied by order dated August 14, 1998.

The statutory provision believed to confer jurisdiction on this Court to review on writ of certiorari the foregoing orders is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amend. I, U.S. Consti.

Amend. V, U.S. Consti.

28 U.S.C. § 2241

28 U.S.C. § 2253

28 U.S.C. § 2255

See the Appendix hereto for the full text of the pertinent portions of the constitutional provisions and statutes involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

Mr. Smith was an attorney entitled to practice law before the Supreme Court of the United States until November 27, 1995, when the Supreme Court issued its order disbarring him from the practice of law before the Supreme Court. This order of disbarment was issued as the direct and proximate result of the motion filed by the Regional Transportation District ("RTD")[1] and its Deputy General Counsel, Rolf G. Asphaug ("Mr. Asphaug"), on or about July 31, 1995, requesting the Supreme Court to issue an order to show cause why Mr. Smith and his client, James Edward Qualls ("Mr. Qualls"), should not be held in contempt for failing to comply with the Supreme Court's (March 6, 1995) order imposing sanctions of $500.00 against them for filing an alleged (by the RTD and Mr. Asphaug) "frivolous" petition for a writ of certiorari.[2]

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[1]The RTD is a political subdivision of the State of Colorado.

[2]Mr. Smith and Mr. Qualls were deprived of their Fifth Amendment due process right to fair notice of the legal and factual basis (if any) for the allegation that they had filed a

On May 16, 1997, the Supreme Court of the State of Colorado issued its order affirming the findings and recommendations issued by a three-member hearing board of the grievance committee of the Colorado Supreme Court on March 6, 1997. In its findings and recommendations, the hearing board declined to disbar or otherwise reciprocally discipline Mr. Smith based on the (November 27, 1995) order of disbarment issued by the Supreme Court of the United States.[3]

"frivolous" petition for a writ of certiorari and of the opportunity to file a brief or otherwise be heard before entry of a final judgment imposing sanctions of $500.00 against them.

[3]The hearing board specifically found and concluded that "the respondent's inability to be heard in a meaningful time and manner as required by the United States Supreme Court's Rule 8 amounts to a denial of due process," that "the proof upon which the disbarment was founded was so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the United States Supreme Court's determination," that "the imposition by the Colorado Supreme Court of the same discipline imposed by the United States Supreme Court would result in grave injustice to the respondent,"

The beneficiary of a court order is prohibited from instituting contempt proceedings against a person who is in alleged violation of that court order, as such action constitutes a violation of that person's due process right to an independent prosecutor. See Young v. United States ex rel. Vuitton, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). In the present case, the RTD and Mr. Asphaug were the beneficiaries of the order issued by the Supreme Court of the United States on March 6, 1995 imposing sanctions of $500.00 against Mr. Smith and Mr. Qualls for filing an alleged (by the RTD and Mr. Asphaug) "frivolous" petition for a writ of certiorari. The RTD and Mr. Asphaug therefore intentionally, willfully and maliciously violated Mr. Smith's and Mr. Qualls' due process right to an independent prosecutor by requesting the Supreme Court of the United States to issue an order to show cause why they should not

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that "the exceptions in Rule 241.17(d) have been satisfied so as to preclude a recommendation that the Colorado Supreme Court impose the same discipline as that imposed by the United States Supreme Court," and that "the respondent's actions did not constitute a violation of any of the Colorado Rules of Professional Conduct set forth in the complaint (R.P.C. Rules 8.4(a), 8.4(d) or 8.4(h))."

be held in contempt for failing to comply with the Supreme Court's (March 6, 1995) order imposing sanctions of $500.00 against them.

As the direct and proximate result of the RTD's and Mr. Asphaug's unconstitutional conduct, Mr. Smith was disbarred by the Supreme Court of the United States. Mr. Smith was also required to defend himself in the reciprocal discipline proceedings instituted against him by the disciplinary prosecutor of the grievance committee of the Supreme Court of the State of Colorado before being acquitted in those proceedings.

On March 5, 1998, Mr. Smith filed in the United States District Court for the District of Colorado his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.[4] Simultaneous with the

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[4]In his petition and motion, Mr. Smith alleged that at the time of the filing of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, he was "in custody" under or by color of the authority of the United States, for an act done or omitted in pursuance of an order, process, judgment or decree of a court or judge of the

filing of his petition and motion, Mr. Smith filed a copy of the transcript of the trial testimony given by Denver lawyer M. Julia Hook on November 25 and 26, 1996, and a copy of the transcript of the trial testimony given by Law Professor Bennett J. Wasserman on November 26, 1996.[5] When considered in conjunction with the other evidentiary materials submitted to the district

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United States, and in violation of the Constitution or laws of the United States. Mr. Smith also alleged that at the time of the filing of his motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, he was "in custody" under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.

[5]Ms. Hook's and Mr. Wasserman's trial testimony was given in People v. Smith, Case No. GC 95B-124, which was pending before a three-member hearing board of the grievance committee of the Supreme Court of the State of Colorado.

court, these transcripts establish the factual basis for Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

On March 11, 1998, United States District Judge Wiley Y. Daniel issued his order dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without granting a hearing or addressing the issues raised and argued by him therein.

On March 25, 1998, Mr. Smith filed his notice of appeal of Judge Daniel's (March 12, 1998) order of dismissal.

On April 1, 1998, the United States Court of Appeals for the Tenth Circuit issued its order requiring Mr. Smith to "show cause within 14 days of the date of this order as to why the district court order dismissing his petition for lack of subject matter jurisdiction should not be summarily affirmed."

On June 19, 1998, the Tenth Circuit issued its order affirming Judge Daniel's dismissal of Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set

aside or correct sentence pursuant to 28 U.S.C. § 2255 without granting a hearing or addressing the issues raised and argued by him in his verified response to order to show cause, and motion for issuance of certificate of appealability (filed on April 15, 1998).

On August 14, 1998, the Tenth Circuit issued its order summarily denying Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on July 6, 1998).

II. ARGUMENT

In his (March 11, 1998) order of dismissal, Judge Daniel found and concluded that Mr. Smith was not "in custody" for purposes of filing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. However, "in custody" means that the petitioner or movant is subject to "restraints not shared by the public generally." See Jones v. Cunningham, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963); see also Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) (continuing government supervision is sufficient for this purpose); Olson v. Hart, 965 F.2d 940, 942-943 (10th Cir. 1992) (probation is sufficient); Zal v.

Steppe, 968 F.2d 924, 926 (9th Cir.), cert. denied, 506 U.S. 1021 (1992) (case was not moot since attorney faced possible disciplinary action); DePompei v. Ohio Adult Parole Authority, 999 F.2d 138, 140 (6th Cir. 1993) (revocation of medical license is sufficient); Nakell v. Attorney General of North Carolina, 15 F.3d 319, 323 (4th Cir.), cert. denied, 513 U.S. 866 (1994) (attorney released on own recognizance following contempt conviction was "in custody"); Oyler v. Allenbrand, 23 F.3d 292, 294 (10th Cir.), cert. denied, 513 U.S. 908 (1994) (possible use of conviction to enhance future sentence was sufficient adverse consequence); Santos v. Franklin, 493 F.Supp. 847 (D.C. Pa. 1980) (activation of reservist from ready reserve to active military satisfied jurisdictional requirement of "in custody").[6] In the present case, Mr. Smith has been

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[6]Even adverse collateral consequences of a conviction have been found to satisfy the "in custody" jurisdictional requirement. See Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Evitts v. Lucey, 469 U.S. 387, 391 n.4, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (presumption of collateral consequences is irrebuttable, even in misdemeanor cases); but see Maleng v. Cook, 490 U.S.

disbarred by the Supreme Court of the United States without being afforded the evidentiary hearing required by Sup. Ct. R. 8 or the independent prosecutor required by Young v. United States ex rel. Vuitton, 481 U.S. 787, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), all in violation of his Fifth Amendment right to due process of law. Under these circumstances, Mr. Smith was and is subject to restraints not shared by the public generally. It therefore follows that Mr. Smith was "in custody" for purposes of filing his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, and that Judge Daniel committed reversible error by finding and concluding otherwise.

By issuing his (March 11, 1998) order dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28

488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam) ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it"); Waldon v. Cowley, 880 F.2d 291, 292 (10th Cir. 1989) (civil collateral consequences not sufficient).

U.S.C. §§ 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without granting a hearing or addressing the issues raised and argued by him therein, Judge Daniel deprived him of his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living, in violation of his Fifth Amendment right to due process of law, including his due process right to a fair and impartial decision-maker.[7] See Offut v. United

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[7]On May 2, 1996, the three-judge disciplinary panel of the United States District Court for the District of Colorado issued its order "strongly" admonishing Mr. Smith for allegedly practicing law in the District Court in violation of its (February 10, 1995) suspension order, and threatening to cite him for contempt of court "if he continues to practice law in this District." This order was based on a complaint filed against Mr. Smith by United States District Judge Wiley Y. Daniel with the Committee on Conduct of the United States District Court for the District of Colorado. In his complaint, Judge Daniel alleged that Mr. Smith "apparently" represented his client in the District Court "notwithstanding the fact that he is unauthorized to practice law before this Court." On this basis,

States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of

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Judge Daniel alleged that "David L. Smith may have acted in an unprofessional manner." Judge Daniel could not be a fair and impartial decision-maker in the present case after filing his unsubstantiated complaint against Mr. Smith with the District Court Committee on Conduct.

Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Dailey v. Vought Aircraft Co., 141 F.3d 224 (5th Cir. 1998) (in order to comply with Fifth Amendment due process of law, a court must, at minimum, follow its own rules relating to attorney discipline). Judge Daniel also deprived Mr. Smith of his First Amendment right to access to the courts to petition the government for a redress of grievances. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government,

litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972).

Under 28 U.S.C. § 2253, Mr. Smith had the right to receive meaningful appellate review of Judge Daniel's (March 11, 1998) order dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§ 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. See Hohn v. United States, ____ U.S. ____, 118 S.Ct. 1969, ____ L.Ed.2d ____ (1998); see also Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231,

111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 584 (10th Cir. 1997). Therefore, by issuing its (June 19, 1998) order affirming Judge Daniel's dismissal of Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 without addressing the issues raised and argued by him in his verified response to order to show cause, and motion for issuance of certificate of appealability, the Tenth Circuit committed a blatant and

egregious violation of his right to meaningful appellate review under 28 U.S.C. § 2253. See id.

III. CONCLUSION

The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. For these reasons, Mr. Smith requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating Judge Daniel's (March 11, 1998) order dismissing Mr. Smith's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, and motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, and reversing and vacating

the Tenth Circuit's (June 19, 1998) order affirming Judge Daniel's (March 11, 1998) order.

Respectfully submitted,

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